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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

File: [redacted] Office: Texas Service Center Date: AUG 18 2003

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds or that the business would generate the requisite employment.

On appeal, counsel argued that the petitioner's investment is at risk and that the director erred in concluding that the record lacked evidence of money changing hands. Counsel further argued that the petitioner has not been able to create any jobs due to the economic downturn that occurred after the terrorist attacks of September 11, 2001. Finally, counsel asserted that he will submit a brief and/or additional evidence to this office within 30 days. Counsel dated the appeal December 9, 2002. On February 12, 2003, this office advised counsel that we had received no additional submissions. As of this date, more than three months later, this office has received nothing further. As such, the appeal will be adjudicated on the record.

In addition to the above findings, the director also determined that the petitioner had not demonstrated that he had established a new commercial enterprise. The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petitioner's appeal was pending on November 2, 2002, he need not demonstrate that he personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 new jobs.

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

MINIMUM INVESTMENT AMOUNT

The petitioner initially indicated that the petition was based on an investment in a business, [redacted] *not* located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the minimum investment amount would be $1,000,000. The petitioner further indicated that he had made two investments of $500,000 each, the first on June 27, 2000. The petitioner submitted no evidence in support of the petition initially. In response to the director's request for additional documentation, counsel amended this claim, asserting that the petitioner had invested $500,000 in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000.

8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. § 204.6(j)(6) states that:

> If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:
>
> (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or
>
> (ii) In the case of a high unemployment area:
>
> > (A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or
> >
> > (B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high

> unemployment area. The letter must meet the requirements of 8 C.F.R. § 204.6(i).

A petitioner must demonstrate that the location of the business was in a targeted employment area at the time of filing. *Matter of Soffici*, 22 I&N Dec. 158, 159-160 (Comm. 1998), *cited with approval in Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1041 (E.D. Calif. 2001).

The petitioner submitted a document entitled "Labor Force Data For Labor Market Areas and Towns" for July 2002. These materials reflect that Waterbury, Connecticut's, unemployment rate was 7.1 percent in July 2002.

The director did not contest that the petitioner had invested in a targeted employment area. The petitioner, however, has not established that Waterbury was a targeted employment area as of the filing date, June 6, 2001, or the date of investment, allegedly June 27, 2000. The materials submitted only relate to July 2002. Moreover, even in July 2002, Waterbury was not a targeted employment area. The labor force materials reflect that the unemployment rate for the United States was 6.0 percent in July 2002. One hundred fifty percent of 6.0 percent is 9.0 percent. Thus, 7.1 percent was not at least 150 percent of the national rate in July 2002. In light of the above, the petitioner has not established that Waterbury, Connecticut, was a targeted employment area at any time, let alone at the times specified in the regulations and the precedent decision cited above.

Finally, the petition is based on an investment in two gas stations, only one of which is located in Waterbury. The second gas station is located in Milford, which had an unemployment rate of only 4.4 percent in July 2002, less than the national rate. The reduced investment amount can only be applied when the requisite job creation accrues to the targeted employment area. *See generally Matter of Izummi,* 22 I&N Dec. 169, 172-173 (Comm. 1998). As some of the alleged job creation will occur outside the alleged targeted employment area, the minimum investment amount is $1,000,000.

INVESTMENT OF CAPITAL

8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.

* * *

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
>
> > (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
> >
> > (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
> >
> > (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
> >
> > (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
> >
> > (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The director concluded that the petitioner had not demonstrated a qualifying investment. The basis of the director's conclusion is that the petitioner submitted only contracts and no evidence

that money changed hands. On appeal, counsel reiterates the claim that [redacted] purchased the petitioner's property in Pakistan and, in payment for this property, invested the money owed to the petitioner by funding the purchase of the gas stations.

As stated above, the petitioner initially claimed to have invested $500,000 on June 27, 2000 and $1,000,000 total. On Part 4 of the petition, the petitioner indicated that the business had $106,031 in a bank account and that $1,000,000 in assets had been purchased for the business. In response to the director's request for additional documentation, counsel asserted that the petitioner had only invested a total of $500,000.

The petitioner submitted a "Report on Valuation" of two of the petitioner's corporations, [redacted] and [redacted] and [redacted] The Certified Public Accountant (CPA) who prepared the report indicates that it is based on the information provided by management and not an audit. The report concludes that the gas stations were purchased for $237,317.48 and $254,321.46 and are now worth $545,217.48 and $556,071.46.

Not all of the increases listed in the report, however, can be considered the petitioner's personal investment. For example, an increase in the value of a company's goodwill after the date of purchase cannot be considered an investment by a shareholder as it does not involve a contribution of cash for an asset whose fair market value is easily evaluated. The regulation quoted above lists as acceptable evidence of investment the "purchase" of assets for the business. The petitioner did not "purchase" the good will that allegedly accumulated after he purchased the business.[1] The regulatory list of acceptable evidence of investment does not include an unaudited financial report alleging an increase in good will.

In addition, the report indicates that "a significant portion of money generated from business has been spent on renovating the existing store structures and installing new furniture and equipments [sic]." The reinvestment of proceeds is not a qualifying investment by the petitioner. The regulations specifically state that an investment is a *contribution* of capital, and not simply a failure to remove money from the enterprise. The definition of "invest" in the regulations does not include the reinvestment of proceeds. In addition, 8 C.F.R. § 204.6(j)(2) lists the types of evidence required to demonstrate the necessary investment. The list does not include evidence of the reinvestment of the proceeds of the new enterprise. *See generally De Jong v. INS*, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997) for the proposition that the reinvestment of corporate proceeds cannot be considered capital.

In addition to the report, the petitioner submitted the closing statement for [redacted] purchase of an Exxon gas station in Waterbury, Connecticut. The purchase price was $237,317.48. The price was paid as follows: $10,000 when the contract was executed, $220,000 by certified check at closing, and $7,317.48 in cash at closing. The petitioner also submitted an undated closing statement for [redacted] purchase of an unidentified gas station with a purchase price of $243,271.99. The certificate of incorporation

[1] The inclusion of good will as part of the purchase price of an existing business can be an acceptable investment expense if the buyer is personally contributing cash for it.

fo[redacted]authorizes 2,000 shares at a par value of one cent each. The corporate documentation for both [redacted] and [redacted] reflect tha[redacted]owns two percent of each company.

Finally, the petitioner submitted an option to purchase a third gas station dated January 3, 2002, specifying a final closing date of March 16, 2002. The petitioner submitted a check for $50,000 dated January 14, 2002, issued to the attorneys handling the deal. The petitioner had not entered into this agreement as of the date of filing and even as of the date of appeal the petitioner has not submitted any evidence that he followed through with his option to purchase this third gas station. The petitioner signed a lease agreement to pay $350,000 as rent for this property over five years, but the agreement is not signed by the landlord. Moreover, the payment of rent over several years by the corporation as a normal operating expense cannot be considered the petitioner's personal investment for the reasons discussed above.

In addition to the concerns expressed above, we concur with the director's concerns. It is insufficient to submit sales documentation alone as the money used to purchase the gas stations could have come from any number of sources other than the petitioner. The only transactional documentation is a single check from the petitioner for $50,000 dated after the petition was filed. The petitioner did not provide wire transfer receipts or cancelled checks for the purchase of the Connecticut gas stations. Thus, the petitioner has not established that the funds came from [redacted] as claimed. Other potential sources, such as a business loan secured by the assets of the commercial enterprise, cannot qualify as the petitioner's personal investment.

Moreover, even if [redacted] paid the funds on behalf of the petitioner as claimed, the petitioner has not established that these funds were contributed as capital. The certificate of incorporation reflects that at least one of the corporations was very limited in the amount of stock it was authorized to issue ($20). Without tax returns certified as filed by the Internal Revenue Service (IRS) or audited balance sheets, the petitioner cannot establish that the funds contributed beyond the authorized amount of stock constitutes additional paid-in-capital as opposed to shareholder loans. Any money loaned to the commercial enterprise cannot be considered the petitioner's personal investment pursuant to the definition of invest at 8 C.F.R. § 204.6(e).

SOURCE OF FUNDS

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this

subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm. 1998); *Matter of Izummi*, *supra*, at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Throughout the proceedings, counsel has asserted that the petitioner obtained his funds through the sale of his property in Pakistan to his fellow shareholder, [redacted] The petitioner submitted the contract for the sale of the property reflecting a sales price of $531,914. Counsel further claims that [redacted] paid for the property by paying the purchase price of the two gas stations.

The director concluded that the petitioner had not submitted evidence of a prior occupation that could account for the accumulation of the investment funds or that he had been paid for the property sold and had used those funds to purchase the gas stations. On appeal, counsel reiterates his claim that the [redacted] paid the purchase price of the property by funding the petitioner's purchase of two gas stations.

We concur with the director. The record contains no evidence such as cancelled checks or wire transfer receipts tracing the money used to pay for the gas stations back to [redacted] Moreover, the record contains no evidence of how the petitioner lawfully accumulated the funds originally used to purchase the Pakistani property subsequently sold to allegedly finance the purchase of the gas stations.

EMPLOYMENT CREATION

8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
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> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
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> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. § 204.6(e) states, in pertinent part:

> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

> Full-Time Employment Defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Finally, 8 C.F.R. § 204.6(g)(2) relates to multiple investors and states, in pertinent part:

> The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

Initially, the petitioner indicated that the business employed one employee at the time of his investment and currently employed 11. In response to the director's request for additional documentation, the petitioner submitted an earlier letter from prior counsel asserting that the petitioner had ten employees and would create another 10 positions. Prior counsel further asserted that the entities that sold the gas stations to the petitioner did not disclose their prior employment information. In his cover letter for the same submission, counsel asserted that the petitioner had four employees. Counsel continued:

> It may be mentioned here that no doubt the petitioner who invested the money, intended to increase the number of employees but due to numerous factors including but not limited to bad economy, diminution in traveling and September 11, 2001 incident the business had gone down and become a distress business and under these circumstances it was not easy to maintain the current level of employment.

The petitioner submitted January payroll documentation for [redacted] and [redacted] reflecting that the first corporation had four employees while the latter had five. Subsequent payroll documentation for [redacted] reflects that as of September 26, 2002, that company employed seven employees, only two of whom had worked more than 40 hours or earned more than $268 year-to-date. One of the two employees who began working prior to September 2002 did not work full-time. As of October 7, 2002, the same corporation had ten employees, one of whom worked part-time. The two additional employees that appear for the first time for October 7, 2002, reflect year to date wages three times what they received for that pay period. The names of the September and October employees for [redacted] overlap with the employees for both [redacted] and [redacted] January 2002.

The director noted that the petitioner had purchased preexisting businesses. The director concluded that the petitioner had not demonstrated that either gas station was a troubled business as defined in 8 C.F.R. § 204.6(e) and, thus, had to demonstrate the creation of 10 new jobs in addition to those already in existence at the time of purchase.

On appeal, counsel states:

> As to the employment criteria, the petitioner has clearly stated that due to the event of September 11, 2001, it was not easy to maintain the current level of the employees. The affect of September 11, 2001 is well known and will be remembered for ever [sic]. No doubt the rules require that the number be increased to 10 more employees, but the rules have no imagination that event like September 11, 2001 would come into play, however, the people who implement the rules, do have the ability to understand the impact of the said event and make

> leeway for adjustment for the affect of the rules. The alien is any way requesting a conditional resident card – which is for two years. Then during the said two years period he intends to expand the business by adding new facility or otherwise expanding the business to increase the number of employees and or net worth of the business.

These assertions and arguments are not persuasive. Not every business has been effected by the events of September 11, 2001. The petitioner provides no evidence that the economy and the events of September 11, 2001 have effected the gas station business.

Moreover, pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho, supra*. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id. at 213.

While under some circumstances we might consider the impact of an event beyond the control of the petitioner, we note that at no time has the petitioner ever submitted a business plan conforming to the requirements above or any document resembling a business plan. Moreover, the petitioner has not documented the number of employees prior to the purchase of the gas

station. It is the petitioner's burden to demonstrate that he has or will create 10 new positions. Thus, it was his responsibility to obtain documentation from the sellers of the gas stations relating to the previous number of employees. Finally, the petitioner has not submitted any Forms I-9 or quarterly wage reports. Thus, the petitioner has not established that any of his employees are qualifying or the pattern of employment over time.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.